United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S.

75-1273

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1273

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL MARCIANO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
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Assistant United States Attorneys, Of Counsel.

3

TABLE OF CONTENTS

TABLE OF CASES

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—v.—

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Marciano appeals from a judgment of conviction entered on July 14, 1975, after a four-day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Superseding Indictment 75 Cr. 402, filed on April 17, 1975, in five counts, charged in Count One that Marciano conspired with defendants Charles Copper, a/k/a "C.J.," Leon Rogers, Thomas Carroll and Vincent McCluskey * to

* Co-defendant Rogers, who was tried with Marciano, was convicted of all counts in which he was named and sentenced to concurrent terms of three years' imprisonment. His conviction was thereafter affirmed in open court, *United States* v. *Rogers*, Dkt. No. 75-1273 (2d Cir., Nov. 7, 1975), with this Court there rejecting essentially the very grounds for relief which Marciano relies on here in Point I of his brief. Co-defendant Copper entered a plea of guilty to the conspiracy count, testified at trial, and received a six-month jail sentence. Co-defendants Carroll and

[Footnote continued on following page]

hijack trucks carrying goods valued at greater than $100, in violation of Title 18, United States Code, Section 371. Count Three charged that Marciano, Carroll and McCluskey, on or about December 15, 1972, received a truckload of 645 cases of stolen canned hams, valued at greater than $100, which were contained in a hijacked Arrow Transportation Company ("Arrow") motor truck, in violation of Title 18, United States Code, Sections 659 and 2.

Count Five charged that Marciano, Carroll and McCluskey, on or about January 22, 1973, received a truckload of 20,000 pounds of stolen frozen seafood, valued at greater than $100 and contained in a hijacked Connecticut Seafood Transport ("Connecticut Seafood") motor truck, in violation of Title 18, United States Code, Sections 659 and 2.*

Trial commenced on May 27, 1975 and ended on May 30, 1975 with the jury returning a guilty verdict on all counts, including those which named Marciano. On July 14, 1975, Judge Bonsal sentenced Marciano to nine months' imprisonment on Count One. Imposition of sentence on Counts Three and Five was suspended, and Marciano was placed on probation for a period of three years on each of the latter counts—the probationary periods to run concurrently with each other and to commence upon expiration of confinement.**

McCluskey, who are not unknown to this Court, *United States* v. *Carroll*, 510 F.2d 507 (2d Cir. 1975), had their cases severed prior to trial. Subsequent to the conviction herein, an order of *nolle prosequi* was entered as to Carroll and McCluskey in view of the life sentences that they are serving.

* Marciano was not named in Counts Two and Four of the superseding Indictment which charged other defendants with the actual hijacking of the two trucks.

** Although Marciano duly noticed an appeal from that conviction, he failed to perfect the same, with the result that it was dismissed by Order of this Court, dated October 2, 1975. Pursuant to Marciano's subsequent application, this Court, by Order, dated November 24, 1975, reinstated the appeal.

Marciano has been continued on bail during the pendency of his appeal.

Statement of Facts

The Government's Case

Through the testimony of eight witnesses, including co-conspirators Carlton Boyd and James Dixon and co-defendant Charles Copper, the Government established that, beginning in October or November of 1972 (Tr. 242), Rogers, Boyd, Dixon and Copper discussed the hijacking of motor trucks on several occasions. Their discussions concerned the hijacking of two tractor-trailer loads of cigarettes (Tr. 243) and the hijacking of lobster and shrimp trucks (Tr. 76, 262). During the same period, defendant Marciano and Thomas Carroll met with Rogers. Boyd, Dixon and Copper in the Two Guys' Bar in Secaucus, New Jersey (Tr. 74-76, 162-64) to discuss the delivery of stolen goods and payment of the hijackers (Tr. 76-78). In connection with both hijackings, Marciano, Carroll and McCluskey were the fences for the stolen goods. The hijackers kept in contact with the fences (i) by meetings at the Two Guys Bar, and (ii) by telephone calls from the hijackers to the fences who were at the Two Guys Bar. Marciano was the person whom the hijackers dealt with by telephone (Tr. 77, 162). In preparation for the hijacking and fencing of the ham shipment in or about December 1972, at least five or six telephone calls were made to Marciano at the Two Guys' Bar (Tr. 162-163). In preparation for the hijacking and fencing of the seafood shipment in or about January 1973, Marciano was in daily telephone communication wtih the hijackers for approximately three weeks immediately prior to those events (Tr. 163).

On December 15, 1972, Boyd, Dixon and Copper hijacked at gunpoint an Arrow motor truck which was

travelling from New York City to Pawtucket, Rhode Island and carrying canned hams valued at approximately $45,000 (Tr. 69, 79-81).

Arrow's freight bill (GX 1) was introduced without objection (Tr. 66) and shows that the truck was loaded with approximately 50,474 pounds of canned hams. There was testimony indicating that the canned hams had a value of $.90 per pound (Tr. 69). Boyd, Dixon and Copper received approximately $3,600 from the fences for this hijacking job (Tr. 256-58).

Between approximately January 2 and January 22, 1973, Rogers, Boyd and Dixon went out looking every business day for a load of shrimp and lobster (Tr. 86-87). Each day they also spoke to Marciano by telephone at the Two Guys' Bar in order to report on their progress in finding a shrimp and lobster truck (Tr. 163, 256). On about 15 occasions, they scouted the Merchants Refrigeration Company at 17th Street and Tenth Avenue in New York City (Tr. 87).

On January 22, 1973, Rogers, Boyd and Dixon hijacked at gunpoint a Connecticut Seafood motor truck driven by Alfred Wade, Jr. which was filled with approximately 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish (Tr. 39, 45). The truck, laden with the frozen seafood, was taken from outside of the Merchants Refrigeration Company on 17th Street and Tenth Avenue in New York City. Wade had picked up the shipment at Merchants Refrigeration for transportation to Connecticut (Tr. 40). After taking Wade's truck, the hijackers drove him and the hijacked truck to New Jersey. They then reported by telephone to Marciano that they had the shrimp and lobster load which, pursuant to Marciano's telephone directions, they took to another location in New Jersey and delivered to the fences. They then drove Wade back to New York, dropping him off in the Bronx (Tr. 89-91).

A few days later, Rogers, Boyd and Dixon received approximately $5,000 from the fences for their efforts, which sum they divided among themselves (Tr. 91-92).

As part of its case, the Government offered various bills of lading (GX 4) with respect to the shipment of lobster tails, shrimp and other frozen fish that had been hijacked on January 22, 1973. These bills, received in evidence without objection, listed the types and quantities of frozen fish contained in the shipment (Tr. 43-44). In addition, the Government offered a number of invoices (GX 5) sent to Connecticut Seafood, the trucking company which related to this same shipment and which indicated that the value of the shipment greatly exceeded $100 (Tr. 45, 49).

Wade, the hijacked driver, testified that both the bills of lading and the invoices were kept by his company in the regular course of business (Tr. 43-44, 45-46). The bills of lading were received in evidence without objection; the invoices were received over objection (Tr. 44, 48). Rogers' counsel inquired as to the value of the frozen fish shipment during the cross-examination of Wade (Tr. 51-52). On redirect, Wade, who had been with Connecticut Seafood for 18 years (Tr. 38) and who had checked the shipment "piece-by-piece" (Tr. 51), testified that the 30,000 to 40,000 pounds of frozen seafood fish had a value greatly in excess of $1,000 (Tr. 59).

The Government also introduced the transcript of Marciano's guilty plea to a New Jersey indictment in which he admitted to having knowingly received five stolen air conditioners in 1970 (Tr. 294-95).

The Defense Case

Marciano took the stand, admitted to having received the stolen air conditioners and his guilty plea (Tr. 329-330, 354) and denied that he had participated in any way

in either of the hijackings at issue or in the receipt or disposition of any hijacked goods at issue (Tr. 336-339). He testified that he had never met Rogers, Boyd, Copper or Dixon (Tr. 327, 329, 332), and that he only knew Carroll and McCluskey as customers at Two Guys' Bar where he worked as a bartender (Tr. 331, 346). However, upon cross-examination, Marciano admitted that he made a trip to New York City with Carroll and McCluskey on January 10, 1973 and was in a garage with them in Manhattan (Tr. 350-353). Inside that garage were a car, a truck and a pair of handcuffs (Tr. 357-358). In addition, when confronted with copies of his prior statements to the FBI and to an Assistant United States Attorney, Marciano stated that he had discussed with them both his employment and his frequent presence at the Two Guys' Bar, but admitted that he never had claimed that he was employed at Two Guys' Bar (Tr. 362-366).

Marciano also called two character witnesses in his behalf.*

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* Co-defendant Rogers also testified in an effort to exculpate himself, but his self-serving story was likewise rejected by the jury.

ARGUMENT

POINT I

The bills of lading and invoices submitted to Connecticut Seafood were properly admitted and were cumulative of overwhelming evidence demonstrating that the frozen fish hijacking involved a truck carrying goods valued at many thousands of dollars.

Marciano argues that the invoices (GX 5) and bills of lading (GX 4), submitted to Connecticut Seafood, in connection with certain items included in the shipment of 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish hijacked by Rogers, Boyd and Dixon on January 22, 1973 and criminally received by Marciano and his two fellow fences, were improperly admitted to demonstrate that the goods in question carried a value greater than $100 (Brief at 1-3). This argument is utterly frivolous.

We note at the outset that irrespective of the documents about which Marciano now complains, the fact that the hijacked seafood shipment had a value in excess of $100 was conclusively established at trial. Marciano himself made no contrary claim at trial, and does not do so on this appeal. Accordingly, the admission of the documents now complained of could not have resulted, under any view, in any prejudice to Marciano. There is no dispute, for example, that the evidence at trial showed that Wade's Connecticut Seafood truck, hijacked by Rogers, Boyd and Dixon on January 22, 1973, was carrying 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish. Nor is there any dispute about the fact that in January, 1973, the three hijackers received $5,000 from their fences for the hijacked load. Finally,

no claim is raised here about Wade's testimony that the 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish had a value greatly in excess of $1,000 (Tr. 59).

The jury, using nothing more than their common experience as consumers, surely inferred that the 30,000 to 40,000 pounds of frozen seafood had a value which dwarfed the minimal $100 requirement. Common sense no doubt also led the jury to conclude that no fence would pay hijackers $5,000 for a shipment worth less than $100. Finally, Wade testified that the value of the shipment greatly exceeded $1,000, and this testimony went uncontradicted (Tr. 59).

Even apart from considerations of this plethora of independent evidence upon which the jury undoubtedly relied in determining the value of this seafood shipment, Marciano's claim is unavailing since the admissibility of the invoices and bills of lading may not properly be challenged on this appeal.

This Court (per Kaufman, C.J., Mansfield and Anderson, J.J.), in affirming without opinion co-defendant Rogers' conviction, has already rejected precisely the same claim that admission of the seafood invoices constituted reversible error. *United States* v. *Rogers*, Dkt. No. 74-1273 (2d Cir., Nov. 7, 1975).* Marciano's present attack

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* The Government is not unaware of the generally limited precedential effect attaching to summary affirmance from the bench without opinion, as in *Rogers*. Rule 50.23, Rules of the United States Court of Appeals for the Second Circuit. The prohibition of Rule 50.23, however, applies by its terms only to "unrelated cases". Since the instant appeal is from a conviction premised upon the verdict at the very trial which was the subject of the appeal in *Rogers*, we respectfully suggest that *Rogers* cannot reasonably be considered an "unrelated" case, and further suggest that the summary affirmance therein is dispositive, as a practical matter, of the instant claim of error regarding the admission of the seafood invoices.

on the bills of lading is foreclosed by his failure to object at trial to the admission of the same. Their admission, in the context of the other uncontroverted evidence of value, was clearly not "plain error". Rule 52(b), Federal Rules of Criminal Procedure.

Indeed, the admission of both the invoices and bills of lading was entirely proper since they were offered for the very limited purpose of establishing the indisputable proposition that the 15 to 20 tons of frozen seafood were worth more than $100. There was no dispute that the invoices had been received by Connecticut Seafood in conjunction with the January 22, 1973 shipment. Nor was any claim raised at trial to suggest that these invoices or the bills of lading were contrived or in any way fraudulent. Indeed, there is nothing whatever to challenge or in any way dispute the trustworthiness of the documents.*

In these circumstances, the District Court surely did not abuse its discretion in admitting the invoices and bills of lading into evidence to establish the very limited proposition that the frozen seafood shipment had a value in excess of $100. *Cf. United States* v. *Leal*, 509 F.2d 122, 127-128 (9th Cir. 1975); Rule 803(24) of the Federal Rules of Evidence. In any event, as this Court has recognized in *Rogers*, the invoices and bills of lading were merely cumulative of overwhelming proof that the seafood shipment had a value far in excess of $100. See *United States* v. *Rosenstein*, 474 F.2d 705, 714 (2d Cir. 1973); *United States* v. *Dawson*, 400 F.2d 194, 199 (2d

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* Marciano makes the utterly groundless suggestion, for the first time on this appeal, that since the invoices post-date the hijacking by a day or two they may reflect values for the hijacked seafood which are improperly inflated for the purpose of defrauding an insurance company. However, since the pertinent issue in this case is whether 30,000-40,000 pounds of frozen seafood were worth at least $100, the contention is ridiculous.

Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *United States* v. *Schabert*, 362 F.2d 369, 371-72 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966).

POINT II

The proof properly and conclusively established that the value of the hijacked Arrow ham shipment involved thousands of dollars.

Marciano asserts that the trial court improperly permitted the Government to prove that the value of the hijacked Arrow shipment exceeded $100 through the testimony of an "expert witness," Guy Mazarin, who was unqualified for the task. The assertion is factually in error, and, like Marciano's first claim of error regarding proof of the value of the seafood shipment, thoroughly frivolous.

Here, as in the case of the seafood shipment, proof that the value of the shipment exceeded $100 was conclusively established, and without objection, by evidence other than that about which Marciano presently complains. Thus, for example, the bill of lading pertinent to the Arrow shipment (GX 1)—whose admission as a business record of Arrow (Tr. 65-66) Marciano did not challenge here or below—evidenced that the shipment hijacked on December 15, 1972 contained 645 cases of canned hams weighing a total of *50,474 pounds* (Tr. 69). Nor is there any dispute that the hijackers received $3,600 from the fences for the hijacked hams (Tr. 256-258). The jury, again using nothing more than their common sense as consumers, surely was fully warranted in inferring that the value of 25 tons of canned ham dwarfed the $100 value requirement, and that no fence would pay $3,600 for goods worth less than $100.

In any event, the testimony of Guy Mazarin about which Marciano here complains, for the first time,* was properly admitted. Mazarin, an assistant to the President of Arrow for 10 years, testified only that while he could not determine the precise value of the shipment of 645 cases of canned hams weighing more than 25 tons by looking at the Arrow bill of lading (GX 1), that shipment necessarily had a value of more than $1,000 (Tr. 68). Mazarin's testimony in that respect was founded on facts known personally to him and simply was not offered as opinion testimony of any expert. Mazarin testified that Arrow frequently transported hams of the kind hijacked and that generally such hams were priced at 90 cents per pound (Tr. 68-69). His testimony that the value of the shipment of 25 tons of canned hams, reflected in the Arrow bill of lading, exceeded $100 was entirely proper and did little more than confirm the obvious. For the reasons set forth above and in Point I, *supra*, Marciano's instant claims are utterly frivolous.

POINT III

Marciano's claim that his in-court identification by Boyd was the product of an impermissibly suggestive pre-trial photographic display is utterly frivolous.

Without any support whatever in the record, Marciano argues that the Government showed Boyd an impermissibly suggestive photographic display prior to trial and

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* Marciano raised no objection whatever at trial to Mazarin's testimony and, even if relevant, co-defendant Rogers objected to Mazarin's testimony that the value of the shipment exceeded $1,000 only on the ground that the question which elicited that testimony had already been asked and answered. Accordingly, Marciano has waived any claim for relief premised on the asserted impropriety of Mazarin's testimony. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

that the latter was the source of Boyd's in-court identification of Marciano as one of the fences (Brief at 5). The argument is premised on a false factual assertion and is utterly frivolous.

First, as the record reflects, and so far as is known to the Government, the only photograph of Marciano ever shown to Boyd, or to any other witness, was the one included among the seven photographs in the spread (GX 9A through 9G) which Judge Bonsal at trial had before him and reviewed in connection with an in-court photographic identification. (Tr. 94-95). The seven picture spread depicted Marciano, with a beard as he looked at the time of the hijacking, and six other men (Tr. 96-98). There was no objection to the spread on the grounds that it was suggestive, nor could such a contention fairly be made.*

Second, at no time prior to or during trial, or even post-trial, did Marciano urge that suggestive photographic procedures were utilized herein. (See Tr. 96-98.)** Moreover, no objection was made to Boyd's in-court identification of Marciano, nor was any request ever made for a *Simmons* hearing (Tr. 74), the absence of which Marciano now claims warrants reversal.

Third, even assuming the existence of some impermissibly suggestive pre-trial identification, there was no possibility, much less "likelihood", of irreparable misidenti-

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* Actually, the record is silent as to when Boyd first saw the seven photographs in the spread, GX 9A-9G; however, all seven of these photographs had been shown to Boyd as part of a single spread prior to trial.

** Marciano's assertion that he was entitled to have his counsel present at any pre-trial, post-indictment display of photographs to a prospective Government witness is clearly wrong. No such right is accorded a defendant whether the photographic display occurs before or after indictment. *E.g., United States ex rel. Peila* v. *Reid*, Dkt. No. 75-2076 (2d Cir., Dec. 11, 1975), slip op. 1025, 1031 n. 1.

fication. At trial, Carlton Boyd identified Marciano in the courtroom as one of the fences with whom he had met on at least two occasions to discuss hijackings (Tr. 74, 83-84). Later in his testimony Boyd identified from a spread of seven photographs (GX 9A through 9G) a photograph of Marciano sporting a beard (Tr. 94, 97). Accomplice James Dixon, who did not identify Marciano, corroborated the evidence that Marciano wore a beard at the time of the ham and seafood hijackings (Tr. 181, 193).* Finally, co-defendant Copper also identified Marciano in the courtroom (Tr. 232, 252) and further testified that Marciano wore a beard at the time of their meetings at the Two Guys' Bar (Tr. 233, 240).

In sum, Marciano not only failed to demonstrate that there was a genuine issue concerning impermissibly suggestive pre-trial identification procedures, he failed also to show how such procedures were likely to have tainted the in-court identifications. Boyd's lengthy exposure to Marciano during the course of two meetings at which the hijackers and fences discussed their plans make clear that Boyd's identification of Marciano was clearly the product of his original observations. See *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020 (2d Cir. 1972); *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971).**

Moreover, Copper also identified Marciano as one of the fences with whom Boyd and the other hijackers had

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* Marciano—whose nickname was "Red Beard" (Tr. 340)—had shaved off his beard only a few months prior to trial (Tr. 344).

** See also *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States* v. *Counts*, 471 F.2d 422, 424-25 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 163-165 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973).

worked. Copper's testimony conclusively corroborated Boyd's and this testimony was not challenged at trial, nor could it have been. Thus, even if, contrary to the facts herein adduced, Boyd's in-court identification was somehow tainted by a suggestive photographic display, the error was clearly harmless beyond any doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Borrone-Iglar*, 468 F.2d 419 (2d Cir. 1972), *cert. denied sub nom. Gernie* v. *United States*, 410 U.S. 927 (1973); *United States ex rel. Joseph* v. *LaVallee*, 415 F.2d 150 (2d Cir. 1969), *cert. denied*, 397 U.S. 951 (1970).

In a word, Marciano's contentions are utterly frivolous.

POINT IV

Marciano's contention that Judge Bonsal's charge improperly referred to Marciano as a "fence" is erroneous and without any merit.

Defendant claims, without support of any trial transcript reference whatever, that Judge Bonsal "in his charge referred to the defendant Marciano as a 'fence' and by doing so invaded the right of the jury to determine the facts and prejudiced the jury against the defendant." (Brief at 7). This contention is wholly frivolous since at no time did Judge Bonsal refer to Marciano as a "fence."

Judge Bonsal's charge to the jury included a reading of Counts Three and Five of the Indictment, which set forth the charges of buying, receiving and possessing the hijacked seafood and ham shipments. The court then explained:

> "So, in effect, the defendant Marciano is charged in these counts with the fencing operation, not the hijacking, but the receiving of the goods, the fencing of the goods." (Tr. 496).

Earlier, Judge Bonsal had explained the term "fencing" to the jury, a word that had been used during the trial (Tr. 233):

> "Well, all that means is that he was taking it for his own interest, not the owner's interest. He was taking it either to sell it himself or to get somebody else to take it over and sell it—'fencing' I think it's called—and that he was going to make some money out of it. He had a financial interest." (Tr. 494).

A reading of the trial transcript makes crystal clear that Judge Bonsal's use of the word "fencing" * was simply a clear and concise explanation of what Marciano was actually being charged with in Counts Three and Five of the Indictment rather than any comment on the evidence (Tr. 494-496).**

Finally, when the Court asked for objections after its charge, Marciano's counsel raised none (Tr. 410). Failure to raise this issue prior to the jury's deliberations alone precludes Marciano from assigning it as error on appeal. Rule 30, Federal Rules of Criminal Procedure.

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* "Fencing" is simply a short-hand word for buying, receiving, or possessing stolen property. See Webster's Third New International Dictionary 837 (Merriam-Webster, 1968).

** Even if, as defendant urges, Judge Bonsal had been commenting on the evidence, he would nonetheless have been acting in accordance within his recognized and well-settled discretion. *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir. 1975); *United States* v. *DeLaMotte*, 434 F.2d 289, 291-92 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

POINT V

Proof of Marciano's commission in 1970 of a prior similar offense was properly adduced through the pertinent portions of the relevant guilty plea allocution.

Marciano incorrectly asserts that a prior similar act must be proved by introduction of the indictment or information, the judgment, the sentence and commitment, and finally, by showing that the defendant in the prior case is one and the same person as the defendant in the pending one (Brief at 8). Marciano urges that since this ritual was not followed in the present case, the reading of the admissions made by him during the guilty plea allocution was improper and requires reversal (*id.*). This argument is without merit and misstates the law.*

At trial, the Government read into evidence certain portions of a 1970 New Jersey Indictment charging Marciano with fencing five stolen air conditioners and pertinent portions of the transcript of the guilty plea allocution containing Marciano's admissions of having knowingly performed the acts charged (Tr. 294-295). The evidence was offered as proof of a prior similar act, probative of Marciano's intent, knowledge and design **

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* It should be noted that defendant's sole citation of authority to support this bizarre proposition, *Gravatt* v. *United States*, 260 F.2d 498 (10th Cir. 1958), is a case which itself relied on a single Oklahoma Criminal Court decision. *Gravatt*, moreover, dealt with a recidivist statute, and the method of proving the earlier crime for purposes of recidivist sentencing.

** At trial, Marciano sought to show that he was merely an unknowing bartender who happened on occasion to answer the telephone at the Two Guys' Bar (Tr. 249, 332-40). Thus, Marciano's intent and knowledge were important elements, which the Government was required to establish to prove Marciano's criminal participation in the hijackings.

with respect to the crimes charged (Tr. 287). Judge Bonsal received the evidence as relevant to defendant's knowledge, intent and motive (Tr. 290-292), and appropriately instructed the jury about the limited purposes for which the evidence was being admitted (Tr. 295, 502).*

Marciano's claim that the method of proof was improper is without any merit. Indeed, this Court has recognized that it is clearly permissible to prove a prior similar act by "a transcript of the relevant proceedings before the court. . ." *United States* v. *Vario*, 484 F.2d 1052, 1054 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974) (citations omitted). Additionally, *Vario* held that an objection to the method of proving a guilty plea is waived when defendant subsequently testifies and admits the accuracy of the evidence of that plea. 484 F.2d at 1055. In the instant case, Marciano did so testify and admit that he had entered a guilty plea to the earlier charge of fencing air conditioners (Tr. 329-330). Defendant's counsel even reiterated this in his summation (Tr. 432-433). In sum, on this record, Marciano's contentions are utterly baseless.

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* The approach followed by Judge Bonsal was clearly correct. *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975). *See generally United States* v. *Miranda*, Dkt. No. 74-2651 (2d Cir. Dec. 3, 1975), slip. op. 6545, 6568; *United States* v. *Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

STEVEN A. SCHATTEN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Steven A. Schatten, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of January, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Law Offices of Kenneth R. Claudat
574 Newark Avenue
Jersey City, New Jersey 07306

ATTN: William M. Schreiber, Esq.

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at ~~One St.~~ Foley Sq. ~~Andrews Plaza~~, Borough of Manhattan, City of New York. SAS

Steven A Schatten
STEVEN A. SCHATTEN

Sworn to before me this

19th day of January 1976

Allen R. Bentley
Notary Public

ALLEN R. BENTLEY
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 19[illegible]